No. 94-326

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

SOUNDGARDEN, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF THE STATE OF WASHINGTON, et al.

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state officer acting in his or her official capacity, who has never threatened or sought to enforce a state statute, is liable for attorneys' fees pursuant to 42 U.S.C. § 1988 when the plaintiff brings an action against the state and the officer challenging the constitutionality of that statute pursuant to a state declaratory judgment act and 42 U.S.C. § 1983 and the plaintiff obtains declaratory and injunctive relief against both the state and the officer pursuant to the state declaratory judgment act but not § 1983.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents the state of Washington and the Attorney General of Washington respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Washington Supreme Court's opinion in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The action below was resolved pursuant to the Washington Uniform Declaratory Judgment Act, not 42 U.S.C. § 1983.

Petitioners are not entitled to attorneys' fees under 42 U.S.C. § 1988 because this action was resolved under the Washington Uniform Declaratory Judgment Act, Wash. Rev. Code § 7.24.010 *et seq.*, not 42 U.S.C. § 1983. The action was filed against the state of Washington, the Washington Attorney

General[1] and the King County Prosecuting Attorney,[2] both in their official capacity. Pet. C-3; C-18, ¶ 6. With regard to jurisdiction, the complaint alleged: "This court has jurisdiction over this declaratory judgment action pursuant to RCW 9.42.010, *as a claim against the state of Washington*, and pursuant to the Uniform Declaratory Judgment Act, RCW 7.42.010, *et seq.*" Pet. C-4, ¶ 3 (emphasis added).

The first jurisdictional statute cited by petitioners, Wash. Rev. Code § 4.92.010, provides in part that: "Any person or corporation *having any claim against the state of Washington shall have right of action against the state in the superior court.*" (Emphasis added.) App. 2a. Wash. Rev. Code § 7.24.010 states:

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

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[1] When this action was filed, the Washington Attorney General was Kenneth O. Eikenberry. Mr. Eikenberry's successor in office is Attorney General Christine O. Gregoire.

[2] Petitioners also named the Snohomish County Prosecuting Attorney as a defendant, but he was dismissed from the case on jurisdictional grounds and is not a party to this proceeding.

Although petitioners' third claim for relief alleged a violation of 42 U.S.C. § 1983 and sought attorneys' fees pursuant to 42 U.S.C. § 1988 (Pet. C-24), the case was not decided on that basis.

This is established by the procedure in the case. First, petitioners brought this action against the state of Washington. It is well established that the state is not a "person" within the meaning of 42 U.S.C. § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Thus, while it is perfectly proper to bring an action against the state pursuant to Wash. Rev. Codes §§ 4.92.010 and 7.24.010, the action cannot be maintained under § 1983.[3]

It is true that the petitioners also named the Attorney General and King County Prosecuting Attorney in their official capacity. However, relief against the state, itself, was central to the petitioners' case. The trial court declared the state's child obscenity law unconstitutional and enjoined the "state of Washington, its officers, agents, servants, employees, and attorney" from enforcing the statute. Pet. D-11, ¶ 4.

The order also enjoined the Attorney General and King County Prosecutor from enforcing the law. However, an

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[3] Washington has not waived its sovereign immunity to § 1983 actions brought in state court. *Rains v. State*, 100 Wn.2d 660, 667-68, 674 P.2d 165 (1983); *Hontz v. State*, 105 Wn.2d 302, 309-10, 714 P.2d 1176 (1986).

injunction against these two officials, alone, would not give the petitioners the relief throughout the state. The injunction against the Attorney General was essentially useless since the Washington Attorney General does not enforce criminal law. (*See infra* pp. 5-6). The injunction against the King County Prosecuting Attorney would only be applicable in that county.

When the petitioners sought attorneys' fees, the trial court correctly concluded that they had essentially abandoned their claim under 42 U.S.C. § 1983 in favor of a declaratory judgment action against the state of Washington and other defendants. According to the trial court:

> Because the Plaintiffs' claim is a declaratory judgment action pursuant to RCW 7.24, and not a civil rights complaint pursuant to 42 U.S.C. § 1983, the Plaintiffs are not entitled to attorneys' fees pursuant to 42 U.S.C. § 1988.

Pet. E-2, ¶ 4. This conclusion is consistent with the order granting the injunction (which was drafted by petitioners) which refers to the action as one for declaratory judgment. ("THIS MATTER came for hearing on October 29, 1992, before the Honorable Mary W. Brucker of the Superior Court of King County on *Plaintiffs' Complaint for a declaratory judgment that* . . . ." Pet. D-1.)

Petitioners argue that the trial court's reasoning runs afoul of the rule that when a claim upon which a plaintiff actually prevails is accompanied by a substantial though

undecided § 1983 claim arising from the same nucleus of facts, a fee award is appropriate. Pet. 20 n.10. This is not the situation presented in this case. Petitioners essentially abandoned their § 1983 claim in favor of a declaratory judgment action against the state of Washington, the Attorney General and the King County Prosecuting Attorney.

2. Petitioners did not establish a violation of 42 U.S.C. § 1983.

Even if petitioners did not abandon their § 1983 claim, the Washington Supreme Court ruled that the petitioners failed to establish a claim under § 1983 because "§ 1983 requires infringement of a person's civil rights before a cause of action accrues. It is undisputed that in this case neither [the Attorney General] nor [the King County Prosecuting Attorney], individually or in their official capacity, has prosecuted or attempted to prosecute anyone under the 'Erotic Music Statute'[.]" *Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 766, 871 P.2d 1050 (1994); Pet. A-35.[4]

The Washington Supreme Court's conclusion is correct. There is absolutely no evidence in the record that the Attorney General or the King County Prosecutor ever threatened or sought to enforce the child obscenity laws. In the case of the Attorney

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[4] This failure of proof is consistent with the trial court's conclusion that petitioners essentially abandoned their § 1983 claim.

General this is because the Attorney General does not have general criminal jurisdiction. Under the Washington Constitution: "The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law." Wash. Const. art. III, § 21. The statutes permit the Attorney General to prosecute a criminal case only upon request of the Governor or a prosecuting attorney. Wash. Rev. Code §§ 43.10.090, 43.10.232. App. 1a.

Under Washington law the general authority to prosecute crimes is granted to the county prosecuting attorney. Wash. Rev. Code § 36.27.020(4). The Attorney General is limited to consulting on such cases (unless requested to prosecute). *State ex rel. Hamilton v. Superior Court*, 3 Wash. 2d 633, 101 P.2d 588 (1940); *State ex rel. Attorney General v. Seattle Gas Co.*, 28 Wash. 488, 68 P. 946 (1902).

At trial petitioners made no attempt to establish that either the Attorney General or the King County Prosecuting Attorney had threatened or sought to enforce the child obscenity statutes.[5] 42 U.S.C. § 1983 provides in part that:

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[5] Indeed, the King County Prosecuting Attorney took no active role in this case and did not appeal the trial court's decision. Before the supreme court, the King County Prosecuting Attorney was merely an interested party. 123 Wash. 2d at 753, n.1. Pet. A-4 n.1.

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

There are two elements necessary to establish a violation of § 1983:

> First, the plaintiff must prove that the *defendant has deprived him* of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the *defendant deprived him* of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."

Adickes v. Kress & Co., 398 U.S. 144, 151 (1970). *See also Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

The first element requires that the defendant do something, that is, deprive the plaintiff of a right secured by the Constitution. In this case neither the Attorney General nor the King County Prosecuting Attorney threatened or took any other action to deprive petitioners of any right.

The requirement that a plaintiff prove that the defendant took some action to deprive the plaintiff of his or her rights is consistent with the legal basis for § 1983 jurisdiction. A § 1983 action for damages will not lie against a state or a state officer, acting in his or her official capacity, in federal court or in state court, if the state has not waived its sovereign immunity. *Will*

v. Michigan Dep't of State Police, 491 U.S. at 71; *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

There is an exception to this rule. A state officer may be sued, in his or her official capacity, for injunctive relief under § 1983 "because official-capacity actions for prospective relief are not treated as actions against the State. See Ex parte Young, 209 U.S. 123 (1908)." *Kentucky v. Graham*, 473 U.S. at 167, n.14. The reason for this different rule is set out in *Ex Parte Young* as follows:

> *If the act which the state attorney general seeks to enforce* be a violation of the Federal Constitution, the officer, in proceeding under such enactment, *comes into conflict with the* superior authority of that *Constitution*, and *he is* in that case *stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.* The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. 123, 159-60 (1908) (emphasis added).

Thus, the basis for § 1983 jurisdiction is that the state officer is acting in an unconstitutional manner. If the officer does not act (or threaten to act) in an unconstitutional manner there is no basis for stripping away the state's cloak of immunity.

3. The decision below does not conflict with the decisions of this Court.

Petitioners assert that the decision below conflicts with *Texas State Teachers' Ass'n v. Garland Indep. Sch. Dist.*, 489

U.S. 782 (1989). Pet. 9-11. This is incorrect because in *Garland* this Court believed that the unconstitutional regulation was likely to be enforced. This Court said:

> [The Court of Appeals] found that the prohibition of teacher speech promoting union activity during school hours was unconstitutional. *It also found that there was a distinct possibility that the school district would discipline teachers who engaged in any discussion of employee organizations during the schoolday*, and that such a policy had a chilling effect on teachers' First Amendment rights.

489 U.S. 786 (citation omitted) (emphasis added). Of course, in this case there was no such finding by either the Washington Supreme Court or the trial court. Indeed, the Washington Supreme Court reached the opposite conclusion.

The amici curiae assert that pre-enforcement actions are necessary to avoid placing a person in the position of risking a criminal sanction to test the applicability of the law. Am. Br. 8. This argument misses the point. A plaintiff who is not subject to the deprivation of his or her rights under § 1983 may still bring a declaratory judgment action to determine his or her rights under the law. However, standing to bring a declaratory judgment action does not automatically translate into a violation of § 1983.

4. This case presents a unique situation that is not ripe for a decision by this Court.

The Washington Supreme Court concluded that there was no liability under § 1983 because the petitioners did not establish

that either the Attorney General or the King County Prosecuting Attorney threatened or sought to enforce the child obscenity statutes. At this point, it is hard to predict the impact of the Washington Supreme Court's analysis. It may be that future plaintiffs will have little difficulty establishing that a state officer, acting in his or her official capacity, has threatened or sought to enforce an unconstitutional law.

For example, in several cases cited by petitioner, the courts found action on the part of the defendants that would give rise to § 1983 liability. *See Garland*, 489 U.S. at 786 ("[the court of appeals] also found that there was a distinct possibility that the school district would discipline teachers who engaged in any discussions of employee organizations during the school-day[.]"); *Fernandes v. Limmer*, 663 F.2d 619, 624 (5th Cir. 1981) ("[t]his controversy first erupted in late 1974 when . . . members were arrested by . . . police for soliciting funds, selling merchandise, and distributing literature in the terminal buildings without a permit in violation of airport regulations."); *Sable Communications of California v. Pacific Tel. & Tel.*, 890 F.2d 184, 186 (9th Cir. 1989) ("Shortly after initiating its sexually explicit message service, Sable received a letter from Pacific Bell threatening to disconnect the service under Tariff 173-T.")

In each of these cases there was a factual finding that would give rise to a conclusion that the defendant had threatened

or was likely to enforce the unconstitutional law which would violate § 1983. The result in these decisions is consistent with the ruling of the Washington Supreme Court.

Here, petitioners' failure to prove a violation of § 1983 may make this case unique. And this failure may be due to the fact that petitioners were concentrating their efforts on their declaratory judgment action against the state, as opposed to a § 1983 action against state officials. Thus, petitioners' dire predictions regarding the impact of this case are premature.

The premature nature of the question presented is also illustrated by lower court decisions cited by petitioners. Petitioners assert that the decision below conflicts with lower court decisions. Pet. 12-16. In fact, these cases illustrate that most courts have simply not considered whether § 1983 liability requires some action on the part of a state official to deprive the plaintiff of his or her rights. For example, in *Aware Women Clinic, Inc. v. City of Coco Beach Florida*, 629 F.2d 1146 (5th Cir. 1980), *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), and *BSA, Inc. v. King Cy.*, 804 F.2d 1104 (9th Cir. 1986), the court found a violation of § 1983 and authorized attorney fees. However, there is no discussion in these cases of whether the officials involved threatened or sought to enforce the statutes in question or whether this was a necessary requirement to establish § 1983 liability. The issue was simply not considered.

In this respect, the question presented by petitioners is not ripe for review. Other courts have not analyzed the issue and this Court does not have the benefit of analysis agreeing or disagreeing with the Washington Supreme Court. The Court would be better served by allowing this issue to percolate in the lower courts long enough to define the problem and air competing views.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Wash. Rev. Code § 43.10.090 Criminal investigations–Supervision. Upon the written request of the governor the attorney general shall investigate violations of the criminal laws within this state.

If, after such investigation, the attorney general believes that the criminal laws are improperly enforced in any county, and that the prosecuting attorney of the county has failed or neglected to institute and prosecute violations of such criminal laws, either generally or with regard to a specific offense or class of offenses, the attorney general shall direct the prosecuting attorney to take such action in connection with any prosecution as the attorney general determines to be necessary and proper.

If any prosecuting attorney, after the receipt of such instructions from the attorney general, fails or neglects to comply therewith within a reasonable time, the attorney general may initiate and prosecute such criminal actions as he shall determine. In connection therewith, the attorney general shall have the same powers as would otherwise be vested in the prosecuting attorney.

From the time the attorney general has initiated or taken over a criminal prosecution, the prosecuting attorney shall not have power or authority to take any legal steps relating to such prosecution, except as authorized or directed by the attorney general.

Wash. Rev. Code § 43.10.232 Concurrent authority to investigate crimes and initiate and conduct prosecutions–Payment of costs. (1) The attorney general shall have concurrent authority and power with the prosecuting attorneys to investigate crimes and initiate and conduct prosecutions upon the request of or with the concurrence of any of the following:

(a) The county prosecuting attorney of the jurisdiction in which the offense has occurred;

(b) The governor of the state of Washington; or

(c) A majority of the committee charged with the overright of the organized crime intelligence unit.

(2) Such request or concurrence shall be communicated in writing to the attorney general.

(3) Prior to any prosecution by the attorney general under this section, the attorney general and the county in which the offense occurred shall reach an agreement regarding the payment of all costs, including expert witness fees, and defense attorneys' fees associated with any such prosecution.

Wash. Rev. Code § 7.24.010 Authority of courts to render. Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Wash. Rev. Code § 7.24.100 Costs. In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just.

Wash. Rev. Code § 4.92.010 Where brought—Change of venue. Any person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court.

The venue for such actions shall be as follows:

(1) The county of the residence or principal place of business of one or more of the plaintiffs;

(2) The county where the cause of action arose;

(3) The county in which the real property that is the subject of the action is situated;

(4) The county where the action may be properly commenced by reason of the joinder of an additional defendant; or

(5) Thurston county.

Actions shall be subject to change of venue in accordance with statute, rules of court, and the common law as the same now exist or may hereafter be amended, adopted, or altered.

Actions shall be tried in the county in which they have been commenced in the absence of a seasonable motion by or in behalf of the state to change the venue of the action.